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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JET INDUSTRIES, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Federal Tort Claims Act grant the federal courts jurisdiction to hear claims of injury caused by the failure of a Government employee to follow Government procedures and guidelines or are such claims barred as a matter of law by the discretionary function exception?

2. Does the Federal Tort Claims Act grant the federal courts jurisdiction to hear claims of injury caused by the negligence of a Government employee in executing the operational details of a discretionary decision or are such claims barred as a matter of law by the discretionary function exception?

3. When is a plaintiff under the Federal Tort Claims Act entitled to discovery of facts bearing on whether the conduct of the Government comes within the discretionary function exception?

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OPINIONS BELOW

The opinion of the court of appeals is reported at 777 F.2d 303 (5th Cir. 1985) and reproduced in Appendix B. The order of the district court is reported at 603 F. Supp. 643 (W.D. Tex. 1984) and reproduced in Appendix C.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

28 U.S.C. §1346(b) provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2674 provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

28 U.S.C. §2680(a) provides:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

STATEMENT OF THE CASE

Petitioner Jet Industries, Inc. ("Jet") filed this action against the United States Government pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§2671-80. Jurisdiction was predicated on 28 U.S.C. §1346(b) and §2674. (Complaint, ¶1.) (App. 1.)

The Government moved to dismiss Jet's action pursuant to Rules 12(b)(1) and 12(b)(6), Federal Rules of Civil Procedure. The district court granted the motion, agreeing with the Government that the action was barred as a matter of law by the "discretionary function" and "misrepresentation" exceptions of the FTCA, 28 U.S.C. §2680(a), (h), and that the Complaint failed to state a cause of action under Texas law. (App. 14-18.) The court of appeals affirmed dismissal of the action in reliance solely upon the discretionary function exception without reaching the other questions decided by the district court. (App. 8-13.)

Jet is a publicly-traded corporation in the business of manufacturing and distributing electric cars nationwide. (Complaint, ¶2.) (App. 2.) In 1982, some of its shareholders sold a controlling interest in Jet to one "Frederix Peter DeVeau." (Complaint, ¶¶10-11.) (App. 4-5.) At the time, Jet did not know, and could not have known, that DeVeau was on probation from federal prison and under the direct and active supervision of the United States Probation and Parole Office. DeVeau reported regularly to the local probation officer charged with supervising him. (Complaint, ¶¶6, 7.) (App. 3.)

The Government knew that DeVeau was a highly successful confidence man with top crime syndicate contacts, who was a danger to the public and had a propensity for

engaging in corporate fraud and theft. The Government made it impossible, however, for members of the public to learn these facts or to learn that DeVeau had been convicted of numerous federal crimes, including mail fraud, racketeering and securities fraud, and that he was using a fictitious identity, which the Government had created as part of the Witness Protection Program. With the encouragement of the Government, DeVeau falsely held himself out to the public as an experienced and honest businessman. (Complaint, ¶¶6-8.) (App. 3-4.)

In April 1982, DeVeau purchased a controlling 23.6% interest in Jet and was elected Chairman of its Board of Directors. This position gave DeVeau access to Jet's bank accounts. The Government knew what DeVeau was doing and that Jet's loss would be the likely result. Shortly thereafter, DeVeau looted Jet of nearly $1,500,000.00. (Complaint, ¶¶11-14.) (App. 4-7.)

Jet alleged that its loss was caused (1) by the Government's violation of its own applicable policies and procedures and (2) because the Government, having decided to supervise DeVeau, failed to properly execute that decision under circumstances which the Government knew or should have known would result in the loss incurred by Jet. (Complaint, ¶¶14-15.) (App. 5-7.) The court of appeals held that Jet's claim was barred as a matter of law by the discretionary function exception. (App. 8-13.)

REASONS FOR GRANTING THE WRIT

1. THIS CASE RAISES CONFLICTS AMONG THE COURTS OF APPEALS ON FAR-REACHING, RECURRING QUESTIONS OF FEDERAL JURISDICTION AND PROCEDURE CONTROLLING WHEN THE GOVERNMENT MAY BE SUED UNDER THE FEDERAL TORT CLAIMS ACT.

For decades, federal courts interpreting the discretionary function exception of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §2680(a), have held that it does not bar claims based on a Government employee's failure to follow Government rules, guidelines or policies. *E.g. Staton v. United States*, 685 F.2d 117, 121 (4th Cir. 1982); *Griffin v. United States*, 500 F.2d 1059, 1067-69 (3d Cir. 1974); *United Air Lines, Inc. v. Wiener*, 335 F.2d 379, 394 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964). It has been similarly well-accepted that once the Government, exercising its discretion, undertakes a task, it may be liable if it carries out the operational details of that task negligently. *E.g. McGarry v. United States*, 549 F.2d 587, 591 (9th Cir. 1976), *cert. denied*, 434 U.S. 922 (1977); *Eastern Air Lines, Inc. v. Union Trust Co.*, 221 F.2d 62, 75-78 (D.C. Cir.), *aff'd sub nom. United States v. Union Trust Co.*, 350 U.S. 907 (1955). These are the types of claims Jet makes here.

The court of appeals' decision in this case that the district court lacked subject matter jurisdiction over Jet's claims conflicts with the opinions of other courts of appeals delivered both before and in the wake of *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 104 S. Ct. 2755 (1984). In *Varig Airlines*, this Court construed the discretionary function exception for the first time in thirty years. In

that case, it was clear that the Government employees involved had acted in accordance with the authority specifically delegated to them by Government policy makers. 467 U.S. at ____, 104 S. Ct. at 2768-69. That is not the case here. (Complaint, ¶14.) (App. 5-7.)

The issues presented here have arisen, and will continue to arise, out of the panoply of Government activities which can lead to litigation under the FTCA. This Court should grant certiorari so that the federal judiciary may act with uniformity in determining its jurisdiction under the Federal Tort Claims Act to hear these diverse, but recurring, cases.

a. Government's Violation Of Its Own Guidelines.

Jet alleged in its Complaint that the Government "violated applicable policies and procedures of the Justice Department, Probation and Parole Office and Marshals Service" when it failed to control DeVeau or to warn Jet of his criminal background. (Complaint, ¶14(d).) (App. 6.) Rejecting Jet's claim that dismissal was improper because discovery would disclose controlling Government guidelines which had not been followed, the Fifth Circuit held that the district court lacked subject matter jurisdiction over Jet's Complaint because Jet did not refer to a controlling statute or published regulation. (App. 12.)

The Fifth Circuit thus ruled that the failure of Government employees to follow the Government's own internal rules and guidelines constitutes a protected discretionary function as a matter of law. This decision is irreconcilable with the decisions of other courts of appeals. Since this Court decided *Varig Airlines* in 1984, both the Eighth and Tenth Circuits have held that Government's

violation of its own rules and policies is actionable and not within the discretionary function exception.

In *McMichael v. United States*, 751 F.2d 303 (8th Cir. 1985), the plaintiff claimed that the failure of Defense Department inspectors to enforce safety regulations at a contractor's munitions plant led to an explosion. The Eighth Circuit held that, under *Varig Airlines*, the district court had jurisdiction over the plaintiffs' claims that their injuries were caused by the Government's failure to follow its own "regular procedures" in enforcing safety regulations. 751 F.2d at 307. The court held that *Varig* was "entirely consistent" with its opinion on a prior appeal in the same case, in which it ruled:

> "The government may not have a legal obligation to promulgate safety rules and conduct inspections for compliance. But once it has exercised its discretion to adopt such rules and to conduct safety inspections, it is obligated in circumstances such as those allegedly present here to take reasonable steps to enforce compliance with the applicable safety regulations. * * * The failure to fulfill that obligation when the interests of safety plainly mandate it is an operational level decision that is not immune from suit under the FTCA."

751 F.2d at 305-06, *quoting*, *Madison v. United States*, 679 F.2d 736, 741 (8th Cir. 1982). *Accord National Carriers, Incorporated v. United States*, 755 F.2d 675, 677-78 (8th Cir. 1985) (failure of Department of Agriculture inspector to tag or segregate contaminated meat held not discretionary).

Similarly, the Fifth Circuit's decision here conflicts with the holding in *Taitt v. United States*, 770 F.2d 890 (10th Cir. 1985). *Taitt*, like this case, involved claims arising out of injuries caused by a federal parolee who was also a participant in the Witness Protection Program. In *Taitt*,

the Tenth Circuit held that because the plaintiffs were entitled to discovery as to whether Government employees had failed to perform a mandatory duty, the district court mistakenly relied on the discretionary function exception to dismiss the action for want of subject matter jurisdiction. 770 F.2d at 895.

Here, the Fifth Circuit reached the opposite conclusion and held that the district court properly declined to hear Jet's claim that Government employees' violation of "applicable policies and procedures" caused Jet to suffer a substantial loss.

The decision here is not the only post-*Varig* opinion in conflict with the holdings of the courts of appeals in *McMichael* and *Taitt*; so too is the decision in *Totten v. United States*, 618 F. Supp. 951 (E.D. Tenn. 1985), *appeal docketed*, No. 85-5921 (6th Cir. Oct. 10, 1985). There, the court held that *Varig Airlines* required dismissal of the action even though the record showed that Air Force personnel violated "controlling military safety regulations." 618 F. Supp. at 954. If the Sixth Circuit affirms this decision, the split between the circuits will have grown still wider.

Furthermore, the court of appeals' decision here—that Jet's claim of injury resulting from the failure of Government employees to follow applicable procedures falls within the discretionary function exception—is contrary to *Hatahley v. United States*, 351 U.S. 173 (1956). In *Hatahley*, this Court held that the Govenment's failure to comply with provisions of the Federal Range Code was not a discretionary function. Rather, "[t]hese acts were wrongful trespasses not involving discretion on the part of the agents, and they do give rise to a claim compensable under the Federal Tort Claims Act." 351 U.S. at 181.

In so ruling, this Court made no distinction between the Government's right to violate published regulations and its right to violate unpublished procedures and guidelines. In contrast, the court of appeals in this case held that the activities of the Government employees charged with supervising DeVeau were discretionary as a matter of law because Jet's Complaint, while alleging that the Government "violated applicable policies and procedures," did not identify a statute or published regulation governing the employees' conduct. (App. 6, 12.) This decision thus conflicts with the principle established in *Hatahley* that Government employees simply are not exercising protected discretion when they violate Government procedures.

The Fifth Circuit's decision here also conflicts with many courts of appeals' decisions, issued prior to *Varig Airlines*, which followed this traditional rule that a Government employee's failure to follow Government-mandated procedures is not a discretionary function.

For example, in *Staton v. United States*, 685 F.2d 117 (4th Cir. 1982), the court held that a park ranger was not performing a discretionary function when he shot dogs running loose in a wildlife sanctuary. A published federal regulation expressly granted the ranger discretion to shoot the dogs, but the court of appeals ruled that this discretion had been eliminated when his superiors adopted a policy of tranquilizing or capturing them. Accordingly, the Fourth Circuit held that the district court had jurisdiction over the owner's claim for the loss of the dogs. In this case, in contrast, the Fifth Circuit held, without a factual record, that the district court should not hear Jet's claim that its loss, like Staton's, was caused by the Government's failure to follow its own guidelines and procedures.

In *United Air Lines, Inc. v. Wiener*, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964), the court up-

held the Government's liability for a mid-air collision between a commercial airliner and an Air Force jet fighter. The Ninth Circuit ruled that Air Force personnel were not engaged in a discretionary function when they violated an Air Force Regulation and adopted certain flight procedures without first conducting a study of commercial passenger air traffic in the area. 335 F.2d at 393-95.

Prior to *Varig Airlines*, other courts of appeals had reached similar conclusions. *Myers & Myers, Inc. v. United States Postal Service*, 527 F.2d 1252, 1261 (2d Cir. 1975) (postal service lacks discretion to disregard its own regulations); *Griffin v. United States*, 500 F.2d 1059, 1068-69 (3d Cir. 1974) (no discretion to release polio vaccine in disregard of regulations); *United States v. DeCamp*, 478 F.2d 1188, 1191-92 (9th Cir.), *cert. denied*, 414 U.S. 924 (1973) (no discretion to violate Army Corps of Engineers safety manual). *See also Jayvee Brand, Inc. v. United States*, 721 F.2d 385, 389 (D.C. Cir. 1983) (discretionary function exception does not apply when a government employee fails to follow obligatory procedures) (dictum).

In sum, the Fifth Circuit's decision here, in reliance on *Varig Airlines*, represents a break with the decisions of this Court and of other courts of appeals which hold that the federal courts have jurisdiction over claims that Government employees caused injuries by violating Government-mandated procedures.

b. Government's Negligent Execution Of Operational Details Of Discretionary Decisions.

The Fifth Circuit's decision in this case also conflicts with the decisions of other courts of appeals which have held that when the Government exercises its discretion and decides to perform a task, the discretionary function

exception does not divest the federal courts of jurisdiction over claims that the Government was negligent in carrying out the operational aspects of that task.

Here, Jet asserted just such a claim. It maintained that although the decision to supervise DeVeau, a dangerous felon on federal probation as well as a protected witness, may have been discretionary, once the decision was made it was incumbent on the Government to execute it properly. (Brief of Plaintiff-Appellant Jet Industries, Inc. at 9, 13, 14-15.) The Fifth Circuit rejected this claim out of hand, holding not only that the discretionary function exception applied to the decision to supervise DeVeau, but that, as a matter of law, "the greater the government's supervision of DeVeau, the greater the discretion the government was required to exercise." (App. 13.)

Yet other courts of appeals, even after *Varig Airlines*, have reached the opposite conclusion. For example, in *Drake Towing Company, Inc. v. Meisner Marine Construction Company*, 765 F.2d 1060 (11th Cir. 1985), and *Eklof Marine Corp. v. United States*, 762 F.2d 200 (2d Cir. 1985), the courts of appeals held that, under *Varig*, although the Coast Guard's decision to place a buoy in a waterway as an aid to navigation is a discretionary function, the implementation of that decision is not and the Government is subject to suit if it places a buoy negligently. In *Drake Towing*, the court summarized the law as follows:

> "[I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, ___ U.S. ___, ___, 104 S. Ct. 2755, 2765, 81 L. Ed. 2d 660, 674 (1984). A governmental act is discretionary and therefore shielded from liability if it is performed "at a plan-

> ning rather than operational level and involve[s] considerations more or less important to the practicability of the Government's . . . program." *Dalehite v. United States*, 346 U.S. 15, 42, 73 S. Ct. 956, 971, 97 L. Ed. 1427 (1953); *see Varig*, ____ U.S. at ____, 104 S. Ct. at 2768, 81 L. Ed. 2d at 678 (challenged government decisions affected "feasibility and practicality of government's regulatory program"); . . . . For the government to show merely that some choice was involved in the decision-making process is insufficient to activate the discretionary function exception. [Citation omitted.] The balancing of policy considerations is a necessary prerequisite.

765 F.2d at 1064. Applying these principles to the case before it, the Court held: "The Coast Guard exercised its discretion when it decided to establish the buoys. *The execution of that decision fell outside the discretionary function exception.*" *Id.* (Emphasis supplied.)

Likewise, in *Alabama Electric Cooperative, Inc. v. United States*, 769 F.2d 1523 (11th Cir. 1985), the court concluded that the district court had improperly dismissed a claim for damage from erosion allegedly caused by the negligence of the Army Corps of Engineers in constructing dikes in a river. The Eleventh Circuit analyzed this Court's decision in *Varig Airlines*, extensively reviewed the prior case law and ruled:

> [W]here the Corps makes a social, economic or political policy decision concerning the design of a particular project, that decision is excepted from judicial review under §2680(a). In the absence of such a policy decision, the Corps' design decisions are subject to judicial review under the state tort law standards that would normally govern an action for engineering malpractice.

769 F.2d at 1536-37. In contrast to the decision here, the court in *Alabama Electric Cooperative* remanded the case

to allow the district court to receive evidence bearing on the nature of the Government's conduct.

The Eighth Circuit, in *McMichael v. United States*, 751 F.2d 303 (8th Cir. 1985), has held that Defense Department inspectors were not performing a discretionary function in inspecting a contractor's munitions plant. The inspectors were simply attempting, albeit negligently, to execute the Department's own procedures for inspection of the plant. 751 F.2d at 307. The court in *Taitt v. United States*, 770 F.2d 890 (10th Cir. 1985) similarly has held that although the decision to provide psychiatric care to a federal prisoner is a discretionary function, the manner in which that decision is executed is not. 770 F.2d at 895.

These decisions, although in conflict with the decision here, are consistent with pre-*Varig* decisions such as *Eastern Air Lines, Inc. v. Union Trust Co.*, 221 F.2d 62 (D.C. Cir.), *aff'd sub nom. United States v. Union Trust Co.*, 350 U.S. 907 (1955) and *McGarry v. United States*, 549 F.2d 587 (9th Cir. 1976), *cert. denied*, 434 U.S. 992 (1977). In *Eastern Air Lines*, the court refused to apply the discretionary function exception to the acts of air traffic controllers in "handl[ing] operational details" of directing air traffic. 221 F.2d at 75. In *McGarry*, the court held that once the Atomic Energy Commission had made the discretionary decision to retain some responsibility for the safety of its contractor's employees, the day-to-day execution of that decision fell outside the discretionary function exception. 549 F.2d at 591.

However, in the wake of *Varig*, the viability of the rule of law followed in these cases has become the subject of conflict among the circuits. The Seventh Circuit has issued an opinion contrary to those of the courts of appeals in the foregoing cases but similar to the position taken by the Fifth Circuit in this case. In *Hylin v. United States*,

755 F.2d 551 (7th Cir. 1985) the court held that inspectors of the Mine Enforcement and Safety Administration ("MESA") were performing a discretionary function when they negligently inspected a mine even though the court presumed that "MESA is required to conduct a full inspection of the premises." 755 F.2d at 554.

Although they reached opposite conclusions, the courts deciding, for example, *Hylin* and *McMichael*, each relied on this Court's decision in *Varig Airlines*. Plainly, *Varig Airlines* has not led to uniformity among the courts of appeals on the far-reaching, recurring issue of when the federal courts have jurisdiction to hear claims that the Government caused injury by negligently executing the operational details of its policy decisions.

c. Right To Discovery To Develop Jurisdictional Facts.

In this case, the court of appeals affirmed dismissal of the action under Rule 12(b)(1), Federal Rules of Civil Procedure, and rejected Jet's argument that "*[d]iscovery will reveal specific Government policies, rules and standards for such supervision [of a dangerous felon], which policies and standards the Government violated.*" (Brief of Plaintiff-Appellant Jet Industries, Inc. at 9-10.) (Emphasis in original.) (*Accord id.* at 1, 4, 12-14.) This decision conflicts with the law of other circuits and is contrary to this Court's decision in *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980).

In *McLain*, this Court applied the standard governing motions under Rule 12(b)(6) to motions under Rule 12(b)(1), ruling that "a complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " 444 U.S. at 246, *quoting, Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Moreover, the Fifth Circuit's rejection in this case of Jet's claim that discovery would show that Government employees had failed to comply with Government procedures directly conflicts with the decision in *Taitt v. United States*, 770 F.2d 890 (10th Cir. 1985). In *Taitt*, the court reversed dismissal of the action and ordered discovery to determine if the Government had violated mandatory procedures. The Tenth Circuit relied on this Court's opinions to re-affirm that:

> "the determination of whether or not a given act by the United States is discretionary, and so excluded from coverage under the Federal Tort Claims Act is very much a factual issue, depending upon evidentiary circumstances present in each individual case."

770 F.2d at 895, *quoting, Howard Routh & Sons v. United States*, 668 F.2d 454, 456 (10th Cir. 1981).

In *Schindler v. United States*, 661 F.2d 552 (6th Cir. 1981), the court held that the Government's motion to dismiss under the discretionary function exception was not ripe for decision. Absent a sufficient factual record, the court declined to rule whether the Government's grant of a license to manufacture polio vaccine was a discretionary function. 661 F.2d at 556-57. *Accord Majd-pour v. Georgiana Community Hospital, Inc.*, 724 F.2d 901, 903 (11th Cir. 1984) ("the district court's dismissal without affording the plaintiff any opportunity to proceed with reasonable discovery [as to jurisdictional facts] was premature and an abuse of the court's discretion").

The court of appeals' decision here thus directly conflicts with the decisions of other courts of appeals and fails to construe the complaint in accordance with the standard adopted by this Court.

2. THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL JURISDICTION AND PROCEDURE, NOT YET SETTLED BY THIS COURT, GOVERNING APPLICATION OF THE DISCRETIONARY FUNCTION EXCEPTION TO THE WIDE VARIETY OF CASES ARISING UNDER THE FEDERAL TORT CLAIMS ACT.

This case raises important, recurring issues not present, and hence not settled, in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 104 S. Ct. 2755 (1984). *Varig Airlines* involved claims against the Government for negligence in certifying two aircraft involved in accidents which resulted in injuries. As this Court explained, the plaintiffs "challenge[d] two aspects of the certification procedure: The [Federal Aviation Administration's] decision to implement the 'spot-check' system of compliance review, and the application of that 'spot-check' system to the particular aircraft involved in these cases." 467 U.S. at ____, 104 S. Ct. at 2768. Both components of the claim were held barred by the discretionary function exception. *Id.*

As to the first component, this Court reasoned:

> When an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind. . . . Here, the FAA has determined that a program of "spot-checking" manufacturers' compliance with minimum safety standards best accommodates the goal of air transportation safety and the reality of finite agency resources. Judicial intervention in such decisionmaking through private tort suits would require the courts to "second-guess" the political, social, and economic judgments of an agency exercising its regulatory function. It was precisely this sort of judicial intervention in policy making that the discretionary function exception was designed to prevent.

467 U.S. at ____, 104 S. Ct. at 2768.

This case, in contrast, involves no challenge to the Government's adoption of policies with regard to the control and supervision of federal parolees and protected witnesses. Rather, it is the way those policies were executed in this specific instance that are challenged.

Indeed, the facts in this case may show that the Government's encouragement of DeVeau rose to the level of aiding and abetting his criminal activity. (*See* Complaint, ¶14.) (App. 5-7.) Such "a wholly unjustified violation of state law involves more than an abuse of discretion" protected by the discretionary function exception and the courts should not presume that the Government intended to adopt a policy that would override the law. *Ruffalo v. United States*, 590 F. Supp. 706, 710-11 (W.D. Mich. 1984).

In ruling that the second component of the plaintiffs' claim in *Varig Airlines* was barred by the discretionary function exception, this Court reasoned:

> The FAA employees who conducted compliance reviews of the aircraft involved in this case were specifically empowered to make policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources. In administering the "spot-check" program, these FAA engineers and inspectors necessarily took certain calculated risks, but those risks were encountered for the advancement of a governmental purpose and pursuant to the specific grant of authority in the regulations and operating manuals.

467 U.S. at ____, 104 S. Ct. at 2768-69.

Just the opposite is the case here. Jet alleged not that the policies were improper, but that the Government's conduct in this particular case was improper because it

violated its own applicable policies and procedures. (Complaint, ¶14(d).) (App. 6.)

The Fifth Circuit nonetheless held that the district court lacked jurisdiction over Jet's claim because Jet could not point to a statute or published regulation which imposed such a duty. (App. 12.) Although this Court has ruled that the failure of Government employees to obey published regulations is not a discretionary function, *Hatahley v. United States*, 351 U.S. 173, 181 (1956), it had never ruled whether employees have discretion to disobey the Government's unpublished procedures and guidelines. This important question presents itself in the wide variety of claims that arise under the FTCA and should be settled by this Court.

Likewise, because the agency procedures adopted by the FAA in *Varig Airlines* expressly granted Government employees discretion in performing their duties, this Court was not called upon to rule whether the discretionary function exception divests the district courts of jurisdiction over claims of Government negligence in executing the operational aspects of a discretionary decision. In *Dalehite v. United States*, 346 U.S. 15 (1953), this Court acknowledged, without deciding, that such negligence may be actionable. 346 U.S. at 37 n. 31, *citing with approval, Toledo v. United States*, 95 F. Supp. 838, 841-42 (D.P.R. 1951). Whether, as the Fifth Circuit held, Government employees have discretion as a matter of law not to use due care in executing the operational aspects of Government decisions is an important question which has not been, but should be, settled by this Court.

In addition, this case presents the important procedural question of a plaintiff's right to discovery of the true nature of the Government's actions in an FTCA case. Neither *Dalehite* nor *Varig Airlines* came to this Court, as this case does, for review of an order granting the

Government's motion to dismiss. Thus, this Court has never determined under what circumstances a plaintiff claiming under the FTCA is entitled to discovery to attempt to show that the Government activities being challenged were not "of the nature and quality that Congress intended to shield from tort liability." *Varig Airlines*, 467 U.S. at ____, 104 S. Ct. at 2765. This question should be resolved.

CONCLUSION

Because the decision of the court of appeals is in conflict with the decisions of other courts of appeals on the same matters and because the decision presents important questions of federal law which have not been, but should be, settled by this Court, this Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

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February 26, 1986

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APPENDIX A

Complaint Of Petitioner Jet Industries, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA 83 CA 2416

JET INDUSTRIES, INC., a Texas Corporation,

Plaintiff,

-vs-

THE UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Jet Industries, Inc., a Texas corporation ("JET"), by its attorneys, Tradd & Hoffman, as its complaint against the Defendant, United States of America ("GOVERNMENT"), states as follows:

General Allegations

1. This action is brought pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80, jurisdiction being predicated on 28 U.S.C. §§1346(b) and § 2674. On November 18, 1982, JET served notice on the GOVERNMENT of its claim for injury, pursuant to 28 U.S.C. § 2675. JET received a notice of final decision rejecting the claim on May 5, 1983. (A copy of the notice and rejection notice are attached hereto as Exhibits 1 and 2, respectively.)

2. JET is a Texas corporation, whose principal place of business is Austin, Texas. JET is a publicly traded corporation which at all relevant times was in the business of manufacturing and distributing electric cars nationwide.

3. The Defendant, the United States of America, is a Defendant by and through the actions of employees of the United States Department of Justice, United States Probation and Parole Office, United States Marshals Service and the Securities and Exchange Commission of the United States.

(a) The Department of Justice is a branch of the United States Government, and is charged with the duty of insuring that the nation is governed by rule of law and that justice is preserved and observed for the benefit of all persons. It has a specific duty to investigate threatened or actual violations of federal criminal law and to undertake acts which will uphold the laws of the United States.

(b) The United States Marshals Service is an agency of the Justice Department and has, among other things, administrative responsibilities concerning federal prisoners.

(c) The United States Probation and Parole Office is an agency of the Judicial Branch of the United States and is responsible for administering and supervising probation and parole for persons who have been convicted of federal crimes.

(d) The Securities & Exchange Commission ("SEC") is a federal agency created by Congress and empowered to make rules and regulations for and to police the securities laws of the United States. Among its duties is to receive and process disclosure notices submitted to it regarding certain types of stock purchases and changes in the status of publicly traded companies, pursuant to Section 13 of the Securities and Exchange Act of 1934 and rules and regulations thereunder.

4. The Witness Protection Program was established as part of the Organized Crime Control Act of 1970. Its purpose is to guarantee the safety of government witnesses who agree to testify against alleged participants in organized criminal activity. The program is implemented through the relocation of witnesses and their families and provides them with new identities, the documents to support those identities, as well as housing, employment and social services.

5. The Attorney General has delegated to the United States Marshals Service virtually all of his authority over the actual administration of the program once a witness has been accepted.

6. Frederix Peter De Veau ("DE VEAU") is an individual who, at the time of the acts described herein, was a protected witness in the Witness Protection Program. Prior to the acts herein, DE VEAU had been convicted of such federal crimes as mail fraud, racketeering and securities fraud; he had been in prison, and he was on federal probation under the direct and active supervision of the United States Probation and Parole Office in connection with one or more of his convictions. Among other things, DE VEAU was known by the GOVERNMENT to be a highly successful confidence man with top crime syndicate contacts, who was a danger to the public and who had a propensity for engaging in corporate fraud and theft.

7. Prior to and at all relevant times herein, the United States, through the Justice Department, Probation and Parole Office and Marshals Service, implemented the Witness Protection Program as to DE VEAU and supervised his probation. The Justice Department, through the Marshals Service, issued to DE VEAU the new fictitious identity of "Frederix Peter De Veau", and he was relocated to the San Antonio, Texas area. At all times herein, DE VEAU was under the supervision of his local probation officer to whom he was reporting regularly.

8. At all times herein, the Marshals Service and the Probation and Parole Office permitted and encouraged DE VEAU to engage in business activities in which he would and could be placed in positions of trust, confidence and responsibility and to represent to the public that he was an experienced and honest business person capable of managing businesses and their affairs. Because of procedures implemented by the Department of Justice to make DE VEAU's location and identity secret, his real identity could not be learned by the public.

9. At the time of the events herein, DE VEAU was under investigation by the SEC for the commission of numerous federal securities violations. In 1981, DE VEAU purchased a controlling interest in a public company called Electric Car Company of America, Inc. ("ELECTRIC CAR") and was then elected as Chairman of its Board of Directors. As a controlling stockholder and as Board Chairman, DE VEAU defrauded the sellers from whom he purchased his shares of ELECTRIC CAR stock out of their purchase price. These frauds and the circumstances relating to the investigation were known by the SEC when the events herein took place and were known or should have been known by the Department of Justice.

DE VEAU'S THEFT

10. In January, 1982, DE VEAU began negotiations with major shareholders and controlling persons of JET to purchase a controlling interest in the company. DE VEAU represented that he had extensive management experience and that he owned a controlling interest in ELECTRIC CAR. DE VEAU did not divulge, and at no time did JET know, that his real name was not Frederix Peter DeVeau, that he had had prior convictions for federal crimes, that he had been in prison, that he was a protected witness in the Witness Protection Program, or that he was on federal probation.

11. On or about April 8, 1982, DE VEAU purchased 1,400,000 shares of stock in JET, which represented a con-

trolling 23.6% interest in the company. The stock was purchased from certain stockholders, some of whom were also members of JET'S Board of Directors. Upon his purchase of the stock, DE VEAU was elected as Chairman of the Board of Directors of JET and had access to JET's bank accounts.

12. Between April and June, 1982, after DE VEAU's purchase of stock and while acting as Chairman of JET's Board of Directors, DE VEAU defrauded and stole from JET the approximate sum of $1,460,000.

GOVERNMENT NEGLIGENCE

13. The GOVERNMENT knew or should have known that DE VEAU was negotiating for and had purchased the JET stock and that he had been elected to its Board of Directors. Among other things, the SEC was given notice of DE VEAU's purchase of stock and his election to the Board of Directors by virtue of the Reg. 13(d) and Current Report Form 8-K filings made by JET with the SEC in April, 1982.

14. The GOVERNMENT, through the employees of federal agencies, acted and failed to act in such ways as carelessly and negligently to cause the loss sustained by JET. Although the GOVERNMENT had actual knowledge of DE VEAU's criminal background as described above, knew of the SEC investigation of DE VEAU's fraud on ELECTRIC CAR, and knew that DE VEAU was negotiating for the purchase of JET stock, the GOVERNMENT acted as follows:

(a) The GOVERNMENT permitted DE VEAU to purchase JET stock and be placed in a responsible position of trust and confidence by JET, with full access to its funds, which circumstances it knew or should have known would result in the loss incurred by JET.

(b) The GOVERNMENT failed properly to control or supervise the activities of DE VEAU, although it had

already decided to control and supervise him and knew that proper supervision was necessary for the public good, particularly in a situation where DE VEAU would have control over the funds and business affairs of a corporation such as JET. The failure to have properly controlled or supervised DE VEAU under these circumstances occurred in the course of the GOVERNMENT's implementation and execution of the Witness Protection Program and of his probation. The GOVERNMENT actively allowed and encouraged DE VEAU to represent himself to the public and to JET to be someone other than who he was and gave him an aura of business respectibility which allowed him to perpetrate a fraud on JET. The GOVERNMENT knew or should have known that its conduct would result in the loss incurred by JET.

(c) The GOVERNMENT failed to warn JET of DE VEAU's criminal background, of the then pending SEC investigation as to ELECTRIC CAR, and otherwise failed to take any action which would have directly or indirectly warned JET of the certain risk it was incurring in doing business with DE VEAU.

(d) The GOVERNMENT's failure to supervise or control DE VEAU or to warn JET of his criminal background, violated applicable policies and procedures of the Justice Department, Probation and Parole Office and Marshals Service, which require the employees of these agencies to act in such a way as to protect the public's welfare. The loss would not have occurred if such policies and procedures had been employed and followed.

(e) The SEC received actual notice in April, 1983 of DE VEAU's purchase of JET stock and his election as Chairman of the Board of JET. The SEC either had no adopted procedures or policies for dealing with a situation where a dangerous criminal or one who was also a protected witness intended to or

had purchased a controlling stock interest in a public company, or otherwise failed to act in a manner consistent with the procedures and policies it had adopted. Although the SEC had knowledge of DE VEAU's past criminal conduct, as well as his theft of ELECTRIC CAR funds and its pending investigation of him under circumstances virtually identical to those involving JET, it failed to take any protective or police action as to DE VEAU's stock purchase or otherwise take any action to directly or indirectly warn JET of the situation.

15. As a direct and proximate result of the above negligent and careless acts of the GOVERNMENT, JET stock was sold to DE VEAU, he was elected Chairman of JET's Board of Directors and he then stole $1,460,000 from the company. The loss of $1,460,000 is JET's damages claimed herein.

WHEREFORE, Jet Industries, Inc. prays that this Court enter judgment against the Defendant United States of America in the sum of $1,460,000, and that JET be granted whatever other relief is deemed just and proper.

JET INDUSTRIES, INC.

By /s/ ALEX S. TRADD II
One of its attorneys

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APPENDIX B

Opinion Of The United States Court Of Appeals For The Fifth Circuit

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Opinion No. 84-2691

JET INDUSTRIES, INC., A Texas Corporation,
Plaintiff-Appellant,

v.

THE UNITED STATES OF AMERICA,
Defendant-Appellee.

Filed November 29, 1985
Before: Garza, Johnson, and Williams, Circuit Judges.
Opinion by Judge Garza

Appeal from the United States District Court
for the Western District of Texas
Edward C. Prado, District Judge, Presiding

SUMMARY

Governmental Torts

Appeal from dismissal of suit. Affirmed.

Jet Industries Inc., (Jet) sued the United States after DeVeau, a federal probationer and protected witness in the Federal Witness Protection Program, defrauded and

stole from Jet approximately $1,460,000. The district court held that the "discretionary function" and "misrepresentation" exceptions to the Federal Tort Claims Act (FTCA) deprived it of subject matter jurisdiction and that Jet had failed to state an actionable claim because the government owed no duty to Jet under Texas common law.

[1] The FTCA excludes liability for claims based upon acts or omissions of a government agency in the exercise of a discretionary function. In determining whether this exception applies, courts must focus on the nature of the conduct rather than the status of the action. The exception was clearly intended to encompass the government acting in its role as the regulator of private persons. [2] No authority cited by Jet indicates that the exception should not apply here. [3] The selection and supervision of participants in the Federal Witness Protection Program constitute discretionary functions. Therefore, the FTCA deprives the district court of jurisdiction.

OPINION

GARZA, Circuit Judge:

Jet Industries, Inc., ("Jet") appeals the district court's order dismissing its action against the United States under the Federal Tort Claims Act ("FTCA"). 28 U.S.C. §§ 2671-80. Jet alleged in its complaint that Frederix P. DeVeau, a federal probationer and protected witness in the Federal Witness Protection Program,[1] defrauded and

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[1] The Attorney General has delegated his authority to offer to provide "for the health, safety, and welfare of Government witnesses and their families" to the United States Marshals Service. 28 C.F.R. § 0.111(c).

Justice Department Policy OBD 2110.2 provides:

> PROTECTED SERVICES. The U.S. Marshals Service will be responsible for the protection and maintenance of those persons designated as protected witnesses. The Witness Security Division, U.S. Marshals Service, will supervise the protection of witnesses and/or their family and household members.

stole from Jet approximately $1,460,000. According to Jet, DeVeau embezzled the money from Jet's bank accounts after being named as chairman of the board of directors—an action that occurred after DeVeau had acquired a controlling interest in the company.

Jet alleged that the government breached its duty to follow established policies designed to protect the public's welfare. Specifically, Jet charged that the government knew or should have known that DeVeau was negotiating for the purchase of Jet's stock and that his conduct would result in Jet's loss. [At the time of the events relating to Jet, the Securities and Exchange Commission was investigating DeVeau for allegedly committing similar fraudulent acts upon another publicly-held corporation.] Jet claimed that the United States Marshals Service and the Probation and Parole Office acted negligently in (1) placing DeVeau in a position of trust and confidence; (2) failing to properly control and supervise DeVeau, and (3) failing to warn Jet of the risk inherent in doing business with DeVeau.

The government moved to dismiss Jet's complaint for want of subject matter jurisdiction and for failure to state a claim upon which relief could be granted pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6). The district court held that the "discretionary function" and "misrepresentation" exceptions to the FTCA deprived it of subject matter jurisdiction and that Jet failed to state an actionable claim because the government owed no duty to Jet under general principles of Texas common law.

In its notice of appeal, Jet challenges the district court's dismissal in all respects. We conclude that the court below properly dismissed Jet's action and affirm the court's judgment.

DISCRETIONARY FUNCTION EXCEPTION

[1] Although the FTCA constitutes a waiver of the United States' sovereign immunity, Congress has specifically excluded liability for claims based upon acts or omissions

of a governmental agency in the exercise of a discretionary function.[2] In determining whether a particular act or omission falls within the discretionary function exception, courts must focus on the nature of the conduct rather than the status of the action; moreover, "whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the government acting in its role as regulator of private individuals." *United States of America v. F. A. Empresa de Vicao Aerea Rio Grandese (Varig Airlines)*, ____ U.S. ____, 104 S.Ct. 2755, 2768, 81 L.Ed.2d 660, 674 (1984).

In *Flammia v. United States*, 739 F.2d 202, 204 (5th Cir. 1984), this court held that the discretionary function exception barred a police officer's suit against the United States based on the government's failure to maintain supervision over a paroled refugee. As in *Flammia*, the case before us involves the regulation of the conduct of a private individual within the meaning of *Varig Airlines*.

Jet, however, argues that few standards or guidelines existed in *Flammia* to guide supervision of the paroled refugee. Jet claims that the limited degree of decision-making in *Flammia* distinguishes it from the present situation. Moreover, Jet asserts that the decision to undertake active supervision negates application of the discretionary function exception, and relies on this court's decision in *Payton v. United States*, 679 F.2d 475 (5th Cir.

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[2] 28 U.S.C. § 2680 provides in pertinent part:

§ 2680. *Exceptions*

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) *Any claim* based upon an act or omission of any employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or *based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.* (Emphasis supplied).

1982) (en banc, Unit B), and other authorities in support of its position.

[2] Although the degree of decision-making is certainly important to the application of the discretionary function exception, neither this court's decision in *Payton* nor any of the other authorities cited by Jet dictate non-application of the exception in this case. In *Payton* we affirmed the view in this Circuit that when the government undertakes to perform services which would not be required in the absence of specific legislation, it will be liable if these activities are performed negligently. *Id.* at 483. *See, Ross v. United States*, 640 F.2d 511, 519 (5th Cir. 1981). However, in *Payton* we held that the district court did not have jurisdiction over those counts of the plaintiff's complaint that alleged that the Board of Parole was negligent in failing to *supervise* the parolee. *Id.* at 481.

The other authorities cited by Jet are inapplicable because of the existence of specific statutory guidelines. *See e.g., McMichael v. United States*, 751 F.2d 303, 307 (8th Cir. 1985) (Defense Department's "quality assurance inspectors" were required to follow a fifty-one step procedure to ensure safety compliance). The statutory and regulatory scheme governing probation does not provide, and Jet fails to identify, any fixed standards or guidelines for supervising probationers. *See* 18 U.S.C. §§ 3651-56; 28 C.F.R. § 2.1, *et seq.*

Jet also relies on *Ruffalo v. United States*, 590 F.Supp. 706 (W.D. Mo. 1984) in arguing that active supervision of a participant in the Witness Protection Program does not fall within the discretionary function exception. Jet's reliance on *Ruffalo*, however, is misplaced. In *Ruffalo*, the government's supervision of a federally protected witness involved conduct that was unauthorized and in violation of state law. By contrast, the government's supervision of DeVeau was neither unauthorized nor in derogation of any federal or state law. As Jet states in its own complaint, the government's supervision of DeVeau was, at most, negligent. In fact, we conclude that in the

absence of specific regulations or guidelines, the greater the government's supervision of DeVeau, the greater the discretion the government was required to exercise.

[3] We conclude that the selection and supervision of participants in the Federal Witness Protection Program constitute discretionary functions. We hold, therefore, that the discretionary function exception of the FTCA deprives the district court of subject matter jurisdiction and bars Jet's suit.[3] *Accord, Bergmann v. United States*, 689 F.2d 789 (8th Cir. 1982); *Leonhard v. United States*, 633 F.2d 599, 625 (2d Cir. 1980) *cert. den'd*, 451 U.S. 908 (1981). The district court's order is affirmed.

AFFIRMED.

[3] Because we conclude that the discretionary function exception deprived the district court of jurisdiction, we need not address the propriety of the court's rulings regarding the "misrepresentation" exception to the FTCA and the government's liability under Texas law.

APPENDIX C

Order Of The United States District Court For The Western District Of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA-83-CA-2416

JET INDUSTRIES, INC.,

Plaintiff,

VS.

THE UNITED STATES OF AMERICA,

Defendant.

ORDER

The matter before the Court is the government's motion to dismiss and plaintiff's resistance thereto. The Court is of the opinion that the recent Fifth Circuit decision in *Flammia v. United States*, No. 83-1597, slip op. (5th Cir. Aug. 20, 1984), compels this Court to dismiss the instant action for want of subject matter jurisdiction and for failure to state a claim upon which relief can be granted pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6).

In its complaint, Jet Industries (Jet) alleges that while Frederix Peter DeVeau was a federal probationer and participant in the Federal Witness Protection Program, he defrauded Jet and stole $1,460,000 from the corpora-

tion. DeVeau has an extensive criminal history of mail fraud racketeering and securities fraud—well known to the government agencies who supervised him. Jet sued the United States under the Federal Torts Claims Act (FTCA) alleging that its negligence in supervising DeVeau's activities and failure to warn Jet of a known risk of fraud caused the fraud to occur. Jet claims that the government owed Jet a duty to follow established policies and to ensure that this crime did not occur.

The United States grounds its motion to dismiss in the discretionary function and misrepresentation exceptions to the FTCA. The government points out that the activities of all of the governmental agencies participating in the selection, supervision, and regulation of DeVeau's activities while in the Witness Protection Program fall within the category of discretionary functions for which there is no tort liability.

Although the United States has waived a portion of its sovereign immunity by creating a cause of action against it under the provisions of the FTCA, 28 U.S.C. §1346(b) et seq., a major exception to liability is reserved for those claims which arise from acts or omissions of a governmental agency which is exercising a discretionary function. 28 U.S.C. §2680. The Supreme Court has defined discretionary function as one in which there is room for a policy judgment. *Dalehite v. United States*, 346 U.S. 15, 36 (1953). The discretionary function is implicated whenever an official must act in an area that is devoid of fixed or readily ascertainable standards. *See Barton v. United States*, 609 F.2d 977, 979 (10th Cir. 1979); *Coastwise Packet Co. v. United States*, 398 F.2d 77, 79 (1st Cir.), *cert. denied*, 393 U.S. 937 (1968).

Jet concedes that negligence occurring at the planning level would be unactionable, but invokes the Fifth Circuit's *Payton* analysis to cloak agency actions at issue here in the actionable mantle of non-discretion—i.e., that those actions are more properly catalogued as operational, ministerial or clerical. *See Payton v. United States*, 679

F.2d 475, 480 (5th Cir. 1982) (en banc). Plaintiff particularly focuses on the supervision of DeVeau by the Marshal's Service as a ministerial and non-discretionary function.

The Supreme Court has recently sharpened our focus on whether a discretionary or non-discretionary function is implicated by agency actions. In *United States v. S. A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, ___ U.S. ___, 104 S.Ct. 2755, 81 L. Ed. 2d 660 (1984), we are directed to center our attention on the nature of the conduct rather than on the status of the actor to determine whether Congress intended to shield the government from tort liability in this case. *See id.* at ___, 104 S.Ct. at 2765. Using this type of analysis two years prior to the *Varig Airlines* decision, the Eighth Circuit determined that both the selection and supervision of participants in the Federal Witness Protection Program constitute discretionary functions of the agencies involved. *See Bergmann v. United States*, 689 F.2d 789, 790-95 (8th Cir. 1982). In view of the *Flammia* decision that the discretionary function exception "extends to specific individual applications as well as broad policies" this Court is persuaded that the *Bergmann* analysis of the Federal Witness Protection Program would be adopted in this circuit as well. *See Flammia v. United States*, No. 83-1597, slip op. at 5367 (5th Cir. Aug. 20, 1984); *see also Smith v. United States*, 375 F.2d 243; 246 (5th Cir. 1967).

In the same vein, it is well settled that SEC regulatory and police activities are discretionary functions under the FTCA. *See Varig Airlines* at ___, 104 S.Ct. at 2762-63. Moreover, plaintiff's claims that the SEC or any other agency deliberately or negligently misrepresented DeVeau's status to Jet is barred by the misrepresentation exception to tort liability under the FTCA. *See Boda v. United States*, 698 F.2d 1174, 1176 (11th Cir. 1983); *Redmond v. United States*, 518 F.2d 811, 814-15 (7th Cir. 1975); 28 U.S.C. §2680(h). Plaintiff's argument that its misrepresentation claim is really a duty to warn claim is circuitous and throws the ball right back into discretionary function territory. In *Bergmann*, the Court reasoned that because

the statute governing the program "contemplate[s] only the protection of the witnesses and their families—not protection of the public from the witness," actions or inactions with regard to protection of the public are discretionary. *See Bergmann v. United States*, 689 F.2d at 797; *see also Franz v. United States*, 707 F.2d 582, 587 (D.C. Cir. 1983); *Leonard v. United States*, 633 F.2d 599, 623 (2d Cir. 1980). The Federal Witness Protection Act in its present form does not create a duty to warn.

Finally, Defendant argues for dismissal on the additional ground of failure to state a claim upon which relief can be granted. Under the FTCA, the United States has expressly limited its waiver of sovereign immunity to claims for negligence arising under "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the alleged negligent act or omission occurred." 28 U.S.C. §§1346(b), 2674; *see Rise v. United*, 630 F.2d 1068, 1072 (5th Cir. 1980). Jet bases its claim for tort liability on the mistaken premise that DeVeau while a participant in the Federal Witness Protection Program was under the "control" of government agents, that such "control" as parole supervision affords gave rise to a duty to use reasonable care in preventing him from doing harm to others. The Supreme Court of Texas has found the existence of a duty of care only in situations where the "control" was custodial in nature. *See Missouri, K & T. RY. Co. of Texas v. Wood*, 66 S.W.2d 449 (Tex. 1907) (employee kept in quarantine by railroad because of contagious infection); *accord Flammia v. United States*, No. 83-1597, slip op. at 5367 (5th Cir. Aug. 20, 1984); *University of Louisville v. Hammock*, 106 S.W.2d 219 (Ky. 1907) (institutionalized mental patient). As the Eighth Circuit recognized in *Bergmann v. United States, supra*, however, the Witness Security Program involves the opposite of custodial control; the participant is released and relocated to live in society under an assumed identity, negating any assertion of control. 689 F.2d at 796. As the Government points out, Jet's argument would write a new chapter in tort

law by imposing enormous liability on the Government for failure to undertake the unworkable task of preventing, or warning potential victims of a crime whenever it has information suggesting that a crime might occur. It is not this Court's place to legislate new tort law for Texas or for the United States. No claim for relief can be granted under these circumstances.

Finding neither jurisdiction over the subject matter nor a claim upon which relief can be granted,

IT IS, THEREFORE, ORDERED that this action be and the same hereby is DISMISSED.

SIGNED this 24th day of October, 1984.

/s/ EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
APR 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1466

In the Supreme Court of the United States

OCTOBER TERM, 1985

JET INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's tort claims were barred by the discretionary function exception of the Federal Tort Claims Act, 28 U.S.C. 2680(a).

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1466

JET INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 8-13) is reported at 777 F.2d 303. The order of the district court (Pet. App. 14-18) is reported at 603 F. Supp. 643.

JURISDICTION

The judgment of the court of appeals (Pet. App. 8) was entered on November 29, 1985. The petition for a writ of certiorari was filed on February 26, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is an action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.* The district court granted the government's motion to dismiss, finding that the action was barred by the "discretionary function" and "misrepresentation" exceptions of the FTCA (28 U.S.C. 2680(a) and

(h)), and that the complaint failed to state a cause of action under state law (see 28 U.S.C. 1346(b), 2674) (Pet. App. 14-18). The court of appeals affirmed, relying on the discretionary function exception of the FTCA (*id.* at 8-13).

1. Petitioner is a publicly traded corporation in the business of manufacturing and distributing electric cars. It alleges that, in April 1982, one Frederix Peter De Veau purchased a controlling interest in the company and was elected chairman of its board of directors. This position gave De Veau access to petitioner's bank accounts, from which he stole $1,460,000. Pet. App. 2, 4-5.

Petitioner asserts that it did not know at the time that De Veau was on probation from federal prison and had been given a fictitious identity through the Federal Witness Protection Program (WPP). In its complaint, petitioner alleged that the government knew that De Veau was a highly successful confidence man with top crime syndicate contacts; that he was a danger to the public and had a propensity for engaging in corporate fraud and theft; that the government made it impossible, however, for members of the public to learn these facts; and that, with the encouragement of the government, De Veau falsely held himself out to the public as an experienced and honest businessman. Thus, petitioner alleged that De Veau's theft from it was caused by the government's carelessness and negligence—specifically, that the government permitted De Veau's activities when it knew or should have known they would result in petitioner's loss; that it failed to control and supervise De Veau properly when it knew that it should have and had in fact decided to do so; that it failed to warn petitioner of the danger De Veau presented; that the failure to supervise, control, and warn violated the Justice Department's policies and procedures, which require protection of the public welfare; and that the Securities and Exchange Commission

either violated its policies or had failed to adopt proper policies for this sort of situation. Pet. App. 2-7.

2. The government moved to dismiss petitioner's complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted (Fed. R. Civ. P. 12(b)(1) and (6)). The district court (Pet. App. 14-18) granted the motion, holding that the discretionary function and misrepresentation exceptions to the FTCA deprived it of subject matter jurisdiction (*id.* at 15-17), and that petitioner had failed to state an actionable claim because the government owed no duty to petitioner under the relevant state law (*id.* at 17-18).

The court of appeals affirmed (Pet. App. 8-13) on the basis of the discretionary function exception. The court determined that petitioner's claim was essentially one of negligent supervision (*id.* at 11-12), and relied on decisions from the Second, Fifth, and Eighth Circuits—as well as *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984)—in concluding that petitioner's action was barred by the discretionary function exception.[1]

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The FTCA is a limited waiver of sovereign immunity, making the federal government liable to the same extent as a private party for certain torts of federal employees acting

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[1]In a final footnote (Pet. App. 13 n.3), the court of appeals noted that, "[b]ecause we conclude that the discretionary function exception deprived the district court of jurisdiction, we need not address the propriety of the [district] court's rulings regarding the 'misrepresentation' exception to the FTCA and the government's liability under Texas law."

within the scope of their employment. The discretionary function exception, however, precludes liability for any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused" (28 U.S.C. 2680(a)). As initially construed by the Supreme Court in *Dalehite* v. *United States*, 346 U.S. 15 (1953), the scope of the discretionary function exception is broad, covering not only federal agencies but "all employees exercising discretion" (*id.* at 33): "Where there is room for policy judgment and decision there is discretion" (*id.* at 36). This broad interpretation of the exception's scope was recently reaffirmed by this Court in *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984). There the Court stressed that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case" and that "the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee—whatever his or her rank—are of the nature and quality that Congress intended to shield from tort liability" (*id.* at 813). Allegedly faulty airplane inspections were within the exception; a particular decision is not outside the exception's scope simply because it applies general agency policy or specific regulations to a given factual situation (see *id.* at 814-820; see also, *e.g.*, *Flammia* v. *United States*, 739 F.2d 202, 204 (5th Cir. 1984)).[2]

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[2]Thus, even if petitioner is correct that the Marshals Service failed to adhere strictly to internal guidelines in supervising De Veau, *Varig Airlines* makes clear that the decisions regarding his day-to-day supervision fall within the scope of the discretionary function exception where there is, as in the WPP, discretion in these day-to-day activities. Certainly discretion is involved in, for instance, determining whether any warning is called for or the type of warning to be made. See, *e.g.*,

a. Petitioner asserts that the government has violated its own guidelines (Pet. 7-11, 19) and negligently executed the operational details of its discretionary decisions (*id.* at 11-15, 19) in this case. Petitioner has, however, consistently failed to say what policies or procedures were violated. Indeed, petitioner apparently conceded in the court of appeals (Br. 14) that "the statutes impose no limit on Government discretion in determining how to, or even whether to, supervise [WPP] participants." Plainly, if petitioner can point to no guidelines, its claim that they were violated must fail.[3] Similarly, the concept of negligently executed "operational details" cannot exist in this case without an objective standard to measure the execution against; as the court of appeals observed (Pet. App. 12-13), "in the absence of specific regulations or guidelines, the greater the government's supervision of De Veau, the greater the discretion the government was required to exercise." This conclusion is correct.

b. Petitioner's response, presumably, is that it needs discovery to find unpublished, internal policies and procedures that were violated; thus, it asserts (Pet. 15-16, 19-20) that dismissal of its suit prior to such discovery was improper. The problem with this argument is twofold. First, petitioner never sought discovery prior to the district

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Dalehite v. *United States*, 346 U.S. at 41-42 (decisions with respect to contents of labeling of potentially explosive fertilizer are within the exception). Indeed, in *Varig Airlines*, the FAA, by certifying the defective aircraft, had failed to "warn" of their dangerous condition. To the extent that the pre-*Varig Airlines* decisions on which petitioner relies hold to the contrary, of course, they have been superseded.

[3]Indeed, violation of federal regulations per se cannot support a claim under the FTCA. See *Art Metal-U.S.A., Inc.* v. *United States*, 753 F.2d 1151, 1156-1157 (D.C. Cir. 1985).

court's dismissal.[4] Second, petitioner cannot rely on unpublished, internal policies and procedures as the source of an enforceable duty. In particular, the presence of internal guidelines is insufficient to transform the government's concededly broad discretion in administering the WPP into non-discretionary, "operational" housekeeping. In numerous contexts, courts have held that Department of Justice internal guidelines create no rights enforceable by third parties. See *United States* v. *Kember*, 648 F.2d 1354, 1370 (D.C. Cir. 1980) (U.S. Attorneys' Manual); *Beverly* v. *United States*, 468 F.2d 732, 746-747 (5th Cir. 1972) (internal guidelines set forth in letter to the House Judiciary Committee regarding applications for immunity); *In re Tierney*, 465 F.2d 806, 813 (5th Cir. 1972), cert. denied, 410 U.S. 914 (1973) (internal Department of Justice guidelines concerning grants of immunity); see also *United States* v. *Hsieh Hui Mei Chen*, 754 F.2d 817, 824 (9th Cir. 1985), cert. denied, No. 84-6648 (June 3, 1985).[5] As the First Circuit

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[4]At no time during the year petitioner's complaint was pending before the district court did petitioner seek discovery: On October 26, 1983, petitioner filed its complaint; on January 10, 1984, in lieu of answer, the government filed a motion to dismiss, asserting all three bases ultimately accepted by the district court; on October 25, 1984, following briefing by the parties, the district court dismissed the complaint, and its judgment was entered on October 26, 1984. In its opposition (filed March 29, 1984) to the government's motion to dismiss (at 10), petitioner stated that "[p]olicies for guidance as to particular situations exist within the Justice Department and will be the subject of [petitioner's] discovery," but discovery was never actually sought. Though this point was made below (see U.S. C.A. Br. 4 n.1), petitioner has never explained the failure.

[5]In numerous other administrative contexts as well, courts have held that similar internal agency guidelines create no rights for private individuals. See, *e.g.*, *Schweiker* v. *Hansen*, 450 U.S. 785 (1981) (Social Security claims manual); *United States* v. *Caceres*, 440 U.S. 741 (1979) (IRS electronic surveillance regulations); *Rank* v. *Nimmo*, 677 F.2d 692 (9th Cir.), cert. denied, 459 U.S. 907 (1982) (Veterans Administration lenders' handbook and circulars); *Chasse* v. *Chasen*, 595 F.2d 59 (1st Cir. 1979) (Customs Service circular concerning employee overtime); *Concerned Residents of Buck Hill Falls* v. *Grant*, 537 F.2d 29

said in *Chasse* v. *Chasen*, 595 F.2d 59, 62 (1979), "[N]ot all agency policy pronouncements which find their way to the public can be considered to be regulations enforceable in federal court"; see also *Concerned Residents of Buck Hill Falls* v. *Grant*, 537 F.2d 29, 38 (3d Cir. 1976). To hold that administrative guidelines are enforceable by third parties would " 'hamper seriously the ability of departmental administrators to communicate freely and flexibly with the employees of their departments by means of written directives' " (*Rank* v. *Nimmo*, 677 F.2d 692, 698 (9th Cir.), cert. denied, 459 U.S. 907 (1982) (quoting *Chasse* v. *Chasen*, 595 F.2d at 65 (Campbell, J., concurring)). Cf. *United States* v. *Caceres*, 440 U.S. 741, 755-756 (1979) (a rigid exclusionary rule in criminal proceedings for evidence obtained in violation of internal IRS electronic surveillance regulations "could have a serious deterrent impact on the formulation" of government standards governing law enforcement procedures). Assuming that internal guidelines exist in this case, they would create no rights for petitioner and, by the same token, could not narrow the discretion the government had.

2. Petitioner errs in arguing (Pet. 7-14) that the court of appeals' decision conflicts with the post-*Varig* decisions of other courts of appeals. First, the non-WPP torts cases the petition cites are distinguishable not only because they did

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(3d Cir. 1976) (Soil Conservation Service guidelines concerning evaluation of watershed projects). The government's decision to put De Veau in the WPP had an unquantifiably incremental impact on the probability of petitioner's injury. Cf. *Martinez* v. *California*, 444 U.S. 277, 281 (1980) (state statute granting absolute immunity to public employees who make parole decisions does not violate due process because its impact on the probability of injury by paroled prisoner to any particular member of the public is incremental; *Martinez* also stressed the remoteness of a causal nexis between the state's alleged negligence and the damage done to plaintiff by a non-state actor (*id.* at 284-285)).

not involve the WPP but also because each[6] involved either allegations of violating specific public regulations[7] or the special circumstance of negligent placement of buoys.[8] The one court of appeals opinion cited which did concern the WPP agreed that decisions concerning the selection and supervision of WPP participants are protected by the discretionary function exception and determined that the

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[6]With one exception: *Alabama Electric Coop., Inc.* v. *United States*, 769 F.2d 1523 (11th Cir. 1985), which involved whether the choice of a particular design for a dike system by the Army Corps of Engineers fell within the discretionary function exception. It is hard to see how any decision under the WPP could fail to be the sort of "social, economic or political policy decision" that the court in *Alabama Electric* distinguished from "engineering malpractice" (*id.* at 1536-1537). In a case decided the week before *Alabama Electric* and much closer to the one at hand, the Eleventh Circuit held barred by the discretionary function exception an action alleging that the FBI negligently used as an informant an individual whose violent propensities resulted in plaintiff's injury. *Ostera* v. *United States*, 769 F.2d 716 (11th Cir. 1985).

[7]*National Carriers, Inc.* v. *United States*, 755 F.2d 675, 677-678 (8th Cir. 1985) (failure to follow regulations regarding contaminated beef); *McMichael* v. *United States*, 751 F.2d 303, 306-307 (8th Cir. 1985) (munitions inspectors merely "review[ed] [a] checklist for safety compliance" and therefore did not make discretionary judgments). As discussed earlier, an unpublished, internal guideline is clearly insufficient to vest a substantive or procedural right in petitioner and to render a discretionary function non-discretionary. In any event, the discretion afforded the government under the WPP is obviously greater than that in the Eighth Circuit cases and, as discussed *infra*, the Eighth Circuit, in *Bergmann* v. *United States*, 689 F.2d 789, 792-797 (1982), has explicitly held that administration of the WPP is within the discretionary function exception.

[8]*Drake Towing Co.* v. *Meisner Marine Constr. Co.*, 765 F.2d 1060 (11th Cir. 1985); *Eklof Marine Corp.* v. *United States*, 762 F.2d 200 (2d Cir. 1985). The decisions apparently concluded that the facts were analogous to *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), which involved a government-maintained lighthouse. While we disagree with the holdings of these courts of appeals, they are distinguishable since, under the WPP, the government's activities are clearly discretionary and not suited to judgment by an objective standard, and there is, of course, no specific reliance by the public.

WPP creates no duty to warn. *Taitt* v. *United States*, 770 F.2d 890, 893-895 (10th Cir. 1985).[9] Cases from other circuits have reached similar conclusions. See *Bergmann* v. *United States*, 689 F.2d 789, 792-797 (8th Cir. 1982); *Leonhard* v. *United States*, 633 F.2d 599, 625 (2d Cir. 1980), cert. denied, 451 U.S. 908 (1981); see also *Franz* v. *United States*, 707 F.2d 582, 586-588, later proceeding, 712 F.2d 1428, 1429-1430 (D.C. Cir. 1983). There is, accordingly, no conflict in the courts of appeals.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1986

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[9] *Taitt* held that decisions regarding a WPP participant's selection, placement, treatment, and release were protected by the discretionary function exception, and that there was no duty to warn of a participant's dangerousness. To the extent that *Taitt* remanded for discovery as to whether government employees failed to perform a mandatory duty, this remand was in connection with statutory obligations under 18 U.S.C. 4205(e), a non-WPP statute, regarding government officials' duties to furnish the Parole Commission with information concerning prisoners eligible for parole. Although we do not agree with the remand, it suffices for present purposes to emphasize that no such statutory or regulatory obligation is at issue here.

[10] Indeed, petitioner has failed in a circuit which has, even after *Varig Airlines*, been relatively restrictive in its construction of the discretionary function exception. See *Collins* v. *United States*, 783 F.2d 1225 (5th Cir. 1986).